

II.

The denial to plaintiffs and all others except persons doing business under a particular name of the right to conduct a lawful business is a denial of the equal protection of the laws.

The right to conduct a lawful business is a property right. All persons similarly circumstanced must be treated alike and immunity granted to a class, however limited, having the effect to deprive another class of a personal or property right is a denial of the equal protection of the laws to the latter class, *Truax v. Corrigan*, 257 U.S. 312; *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540, 559; *Royster Guano Co. v. Virginia*, 253 U.S. 412; *Southern Railway Co. v. Greene*, 216 U.S. 400; *Stewart Dry Goods Co. v. Lewis*, 294 U.S. 530.

III.

The exercise of federal equity jurisdiction is justified.

An injunction against the enforcement of an unconstitutional state statute, when it is essential to the protection of property rights, is a proper exercise of federal equity jurisdiction: *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55; *Sterling v. Constantin, et al.*, 287 U.S. 378; *Michigan Public Utilities Commission v. Duke*, 266 U.S. 570, 578.

The fact that prosecuting officers of the state have threatened to enforce against the plaintiffs an unconstitutional state law relating to their business, and if not enjoined will prosecute the plaintiffs unless they comply with such law, shows the imminence of irreparable injury justifying the exercise of federal equity jurisdiction since withdrawal from further business until a test case is

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 129

GEORGE W. DOUD, DONALD G. McDONALD, and J.
WESLEY CARLSON, Doing Business as BONDIFIED
SYSTEMS, and EUGENE DERRICK,

Appellants.

vs.

ORVILLE HODGE, Auditor of Public Accounts of the
State of Illinois, et al.,

Appellees.

Appeal from the United States District Court
for the Northern District of Illinois.

BRIEF FOR APPELLANTS.

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taken through the state courts, and perhaps to this Court, would result in a substantial loss of business for which no compensation could be obtained. *Toomer v. Witsell*, 334 U.S. 385, 392; *Cline v. Frink Dairy Co.*, 274 U.S. 445, 452; *Hy-Grade Provision Co. v. Sherman, et al.*, 266 U.S. 497, 500; *Kennington v. Palmer*, 255 U.S. 400; *Gibbs v. Buck*, 307 U.S. 66, 77, 78.

CONCLUSION:

The inclusion in the definition of the term "community currency exchange" of one who, though not engaged in the check cashing business ordinarily designated by that term, is "engaged in the business of selling or issuing money orders", coupled with the exemption by name of a concern engaged in that very business, renders the statute discriminatory and unconstitutional as applied to the plaintiffs, or to any other person or firm engaged in the business of selling or issuing money orders but not in the ordinary business of a currency exchange.

For the reasons stated it is respectfully submitted that the decree and opinion are based upon a misconception of the decisions of this Court and that the judgment of the court below should be reversed.

JOHN J. YOWELL,

Counsel for Plaintiffs.

INDEX

	PAGE
Opinions below	1
Jurisdiction	2
Statute involved	2
Questions presented	2
Statement	9
Summary of Argument	9
Argument:	10
I. The District Court had jurisdiction	10
II. The denial to plaintiffs and all others except persons doing business under a particular name of the right to conduct a lawful business is a denial of the equal protection of the laws.	11
III. The exercise of federal equity jurisdiction is justified	11
Conclusion	12

CITATIONS.

Cases:

Cline v. Frink Dairy Co., 274 U. S. 445	12
C.I.O. v. McAdory, 325 U. S. 472	10
Connolly v. Union Sewer Pipe Co., 184 U. S. 540	11
Federation of Labor v. McAdory, 325 U. S. 450	10
Gibbs v. Buck, 307 U. S. 66	12
H. Grade Provision Co. v. Sherman, et al, 266 U. S. 497	12
Kennington v. Palmer, 255 U. S. 100	12
McDougall v. Lueder, 389 Ill. 141	10

Michigan Public Utilities Commission v. Duke, 266 U. S. 570	11
Royster Guano Co. v. Virginia, 253 U. S. 412	11
Southern Railway Co. v. Greene, 216 U. S. 400	11
Spector Motor Co. v. McLaughlin, 323 U. S. 101	10
Sterling v. Constantin, et al, 287 U. S. 378	11
Stewart Dry Goods Co. v. Lewis, 294 U. S. 550	11
Thompson v. Consolidated Gas Utilities Corp., 300 U. S. 55	11
Toomer v. Witsell, 334 U. S. 385	12
Truax v. Corrigan, 257 U. S. 312	11
Watson, et al v. Buck, et al, 313 U. S. 387	10

STATUTES

Illinois Community Currency Exchanges Act, Revised Statutes Illinois 1953, c. 161	2, 3-6, App. 1a-4a
28 U.S.C. 1253, Act of June 25, 1948, c. 646, 62 Stat. 926	2
28 U.S.C. 2281, Act of June 25, 1948, c. 646, 62 Stat. 968	3
28 U.S.C. 2284, Act of June 25, 1948, c. 646, 62 Stat. 968	3

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BRIEF FOR APPELLANTS.

OPINIONS BELOW.

The opinion of the District Court and the dissenting
opinion are reported in 127 Federal Supplement 853 and
856 respectively.

JURISDICTION.

The judgment was entered February 9, 1955 and notice
of appeal was filed on April 8, 1955 in the United States
District Court for the Northern District of Illinois, East.

ern Division. Statement as to jurisdiction was filed in this Court June 6, 1955. Probable jurisdiction was noted October 10, 1955. Jurisdiction of this Court rests on 28 U.S.C. 1253, 62 Stat. 926.

THE STATUTE INVOLVED.

The Illinois statute involved is entitled "An Act in relation to the definition, licensing and regulation of community currency exchanges and ambulatory currency exchanges, and the operators and employees thereof, and to make an appropriation therefor and to provide penalties and remedies for the violation thereof", approved June 30, 1943, Illinois Laws of 1943, volume 1, page 223, as amended by Act approved June 27, 1951, Laws 1951, page 562; being chapter 161 1/2 Revised Statutes of Illinois 1953. The text of the pertinent provisions of the statute is set forth in the appendix.

QUESTIONS PRESENTED.

(1) Whether the jurisdiction of the Federal Court is dependent upon a prior determination by the state Supreme Court that the statute is constitutional *as to plaintiffs* when (a) that court has held the Act and the exemption therein constitutional generally, (b) the statute is clear and unambiguous, and (c) its application to plaintiffs is unquestioned.

(2) Whether the Illinois Community Currency Exchanges Act denies to plaintiffs the equal protection of the laws in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States in view of the identical character of the business conducted by American Express Company in Illinois and that in which plaintiffs are engaged and intend to engage in Illinois in that

(a) The said statute imposes license fees and conditions upon the sale of Bondified Systems money orders in separate business establishments, and exempts such sales of American Express Company money orders from all such requirements;

(b) Said statute absolutely prohibits the plaintiffs from engaging in a lawful business, namely, the sale of money orders in retail stores, while permitting American Express Company to engage in the same activity;

(c) Said statute permits operators of retail stores, including the plaintiff Derrick, to sell American Express Company money orders but prohibits them from selling Bondified System money orders.

STATEMENT.

This action challenges the Illinois Community Currency Exchanges Act as a violation of the equal protection clause of the Fourteenth Amendment. The plaintiffs sought injunctive relief pursuant to Sections 2281 and 2284 of Title 28 U.S.C. After the case was tried by the three judge District Court on the issues joined by the amended complaint and the answer thereto the action was dismissed on the ground that the court lacked jurisdiction.

It was alleged in the amended complaint that the amount in controversy exceeds the jurisdictional amount (Rec. 6); that the plaintiffs Doud, McDonald and Carlson constitute a partnership doing business under the firm name of "Bondified Systems" (Rec. 6), and that the plaintiff Derrick is a licensed pharmacist who owns and operates a drug store in Wheaton, Illinois (Rec. 21); that the defendant Hodge is the Auditor of Public Accounts and that

the defendant Castle is the Attorney General of the State of Illinois; that the defendant Gutknecht is State's Attorney of Cook County, residing in the Northern District of Illinois (Rec. 6, 7); that the partnership is organized for the purpose of engaging, intends to engage and has been engaging not in the ordinary business of a currency exchange, but exclusively in the business of selling and issuing money orders under the firm name of "Bondified Systems" in the State of Illinois (Rec. 7); that an Act in relation to the definition, regulation and licensing of community currency exchanges as amended in 1951 is in full force and effect in the State of Illinois as Sections 30 to 56.3 of Chapter 16 $\frac{1}{2}$ of the Illinois Revised Statutes 1953 which purports to regulate the business of a community currency exchange,—defined to be a person, firm or corporation (a) engaged in the business of providing facilities for cashing checks, drafts and money orders for a fee or service charge or other consideration, or (b) engaged in the business of selling or issuing money orders under his, their or its name, or any other money orders, or (c) engaged in both such businesses, subject to certain exemptions. (Rec. 13, 14).

It was alleged that the statute contains two classes of exemptions: (1) state and national banks, which are specifically exempted from the definition of a currency exchange, and (2) all persons, firms and corporations engaged in the business of selling or issuing United States Post Office money orders, American Express Company money orders, Postal Telegraph Company money orders, or Western Union Telegraph Company money orders; which are also specifically exempted from the definition of a community currency exchange (Rec. 14).

It was alleged that the Act provides that no person, firm or corporation which is not exempted from the definition of a community currency exchange shall engage

in the business of selling or issuing money orders without first securing a license to do so from the Auditor of Public Accounts from the State of Illinois; application for which must be made in the form prescribed and accompanied by a fee for the cost of investigating the applicant; that in the event the application is denied the fee is retained by the auditor, and if approved a license fee of \$50.00 is to be paid and a like fee is to be paid annually thereafter (Rec. 14); that a surety bond is required, the maximum amount of which is \$25,000.00 (Rec. 14, 15); that each license must file annual reports under oath and that the auditor may at any time, and shall at least once each year investigate the business of each licensee, and each licensee must pay to the auditor for such investigation a fee of \$20.00 for each day or part thereof for each representative designated by the auditor and required to conduct such examination (Rec. 15).

It was further alleged that the statute provides that a community currency exchange shall not be conducted as a department of another business; that it must be an entity financed and conducted as a separate business unit and that no community currency exchange licensed for the first time shall share any room with any other business, trade or profession, nor shall it occupy any room from which there is direct access to a room occupied by any other business, trade or profession (Rec. 15).

It was alleged that the American Express Company operates its money order business in substantially the same manner in which the plaintiffs operate; that the American Express Company is an aggregation of individuals operating under a joint stock company plan and that it is not a corporation (Rec. 16); that no statutes of the State of Illinois provide for any regulation by any Illinois board, commission or regulatory body, of the operations of the

It was further alleged that the plaintiff Derrick has become an agent of the plaintiffs Doud, McDonald and Carlson, doing business as "Bondified Systems", for the sale and issuance of money orders of Bondified Systems and has conducted and desires to conduct the business of selling money orders in connection with his drug store in Wheaton, Illinois (Rec. 22); that immediately upon obtaining his agency license he sent to the defendant Auditor a letter by registered mail, duly receipted for, advising that he had received such agency from Bondified Systems, a partnership, who had advised him that they had the right to grant him this agency under a license from Bondified Systems, Inc.; that he had been told that the Community Currency Exchange Act of Illinois does not authorize his sale of such money orders but that he believes and contends that the law violates his constitutional right to operate a perfectly legal business of selling such money orders if he chose to do so and that he was taking this means of advising the Auditor of his intention to commence sales as soon as he received his supplies (Rec. 22).

The answer alleged detailed figures showing the size of American Express Company (Rec. 28) and the volume of business of currency exchanges in Illinois (Rec. 26, 27); and further alleged that the plaintiffs came into equity with unclean hands because the words "licensed" and "bonded" on its money orders was "calculated to deceive and defraud the people of the State of Illinois into the belief that Bondified Systems, Inc. was licensed and bonded in accordance with the provisions of said Illinois Currency Exchanges Statute" (Rec. 33).

The Court made no findings with respect to any affirmative allegations of the answer, but found that the amount in controversy exceeds the sum of \$3,000.00, exclusive of

interest and costs (Rec. 509); that the plaintiffs Douil, McDonald and Carlson constitute a partnership which was organized for the purpose of, intends to engage, and has been engaging not in the ordinary business of a currency exchange, but exclusively in the business of selling and issuing money orders under the firm name "Bondified Systems" in Illinois; that the business is to be conducted through agents who are principally engaged in operating retail drug, hardware and grocery stores; that on April 11, 1953 said plaintiffs appointed the plaintiff Derrick (who conducts a drug store) as their agent for the sale to the public of post card checks and money orders issued by the partnership firm; that the American Express Company is an aggregation of individuals operating under a joint stock company plan and is not a corporation; that it sells and issues money orders in the City of Chicago, Illinois through operators of drug and grocery stores; that it does not operate under any franchise granted by the State of Illinois and is not subject to regulation by any regulatory body thereof (Rec. 509):

The Court further found, that "it thus appears that plaintiffs intend to engage in only one phase of the activities in which a currency exchange may engage if licensed under the Act in question, that is the business of selling or issuing money orders under their name. It also appears that American Express Company which is exempt from the operation of the Act is engaging in the same activity" (Rec. 509); that "it further appears that plaintiffs intend to, and American Express Company does, engage in this business through agents operating retail stores of the same types"; and that "American Express Company operates only that part of a general currency business which is limited to the selling and issuing of money orders. It does it without a license issued under

the Act within the same limits within which plaintiffs wish to operate without being licensed" (Rec. 509, 510).

The Court then concluded that the amended complaint should be dismissed for want of jurisdiction on the ground that it could not decide the constitutional question presented in the absence of an authoritative determination by the Illinois Supreme Court that the exemption of American Express Company is constitutional as applied to persons in the position of these plaintiffs (Rec. 510).

One of the judges dissenting stated that he would grant the prayer of the plaintiffs' amended complaint (Rec. 507, 508).

SUMMARY OF THE ARGUMENT.

The District Court had jurisdiction, the Supreme Court of Illinois in holding the Act constitutional having found that the exemption provision is not severable.

The denial to plaintiffs and all others, except the persons doing business under a particular name, of the right to conduct a lawful business, is a denial of the equal protection of the laws.

An injunction against the enforcement of an unconstitutional state statute, when it is essential to the protection of property rights, is a proper exercise of federal equity jurisdiction. The fact that prosecuting officers of the state have threatened to enforce against the plaintiffs an unconstitutional state law relating to their business, and if not enjoined will prosecute the plaintiffs unless they comply with such law, shows the imminence of irreparable injury justifying the exercise of such jurisdiction.

ARGUMENT.

I.

The District Court had jurisdiction.

(a). The prohibition of the challenged statute extends to all persons, firms and corporations, which necessarily includes the plaintiffs; the defendants have admittedly construed the Act to apply to plaintiffs and there is no ambiguity nor lack of clarity in this respect. It is only when a challenged state statute is ambiguous or its application or scope so ill defined as to require construction that the federal courts await construction by the state courts and even then merely stay action pending state court proceedings, their jurisdiction not being dependent upon a previous presentation of the constitutional question to the state court.

(b) The Supreme Court of Illinois has held the Act and the exemption valid without suggesting that its decision in any way rested on the nature of the activities of the plaintiffs in the decided case, [*McDougall v. Lueder*, 389 Ill. 141 (1945)].

(c) The Illinois court held that "the General Assembly would surely never have passed the Act if they had thought the said companies would be made subject to its rules and regulations", thus finding that the exemption provision was not severable, all of which distinguishes the case from *Watson, et al. v. Buck, et al.*, 313 U.S. 387, *Spector Motor Co. v. McLaughlin*, 323 U.S. 101, *Federation of Labor v. McAdory*, 325 U.S. 450, and *C. I. O. v. McAdory*, 325 U.S. 472.

and their agents and this is expressly admitted in the answer in the District Court (R. 29).

But the Court is asked by appellees to examine, analyze and weigh the evidence, to draw inferences therefrom which the District Court refused to draw, and to decide the case on the basis of findings of fact which the trial court refused to make—findings other and different from those made by the District Court. There is no showing or contention that the findings made by the trial court were clearly erroneous, and Rule 52(a) of the Rules of Civil Procedure applies. *U. S. v. U. S. Gypsum Co.*, 333 U.S. 364, 394; *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 274, 275; *U. S. v. Yellow Cab Co.*, 338 U.S. 338.

Appellees appear to contend that the District Court should have found, and that this Court should find, or direct the District Court to find on this record that plaintiffs did not come into court with clean hands because money orders sold by plaintiff Derrick (R. 224, 225, 258) under a sublicense from the plaintiffs Doud, McDonald and Carlson (R. 182-185), pursuant to a license duly assigned to them (R. 143-146) from Checks, Inc., the owner of the exclusive right to the printing and sale of "Bondified" money orders, a duly copyrighted and state-registered medium for the transfer of money (R. 135-142), bore the words "licensed" and "bonded." At the conclusion of the trial appellees made the same contention (R. 117-122), which the District Court refused to take seriously. The appellees, at page 10 of their brief, purport to set forth the text of the Bondified money order form, but omit the facts (a) that on each money order it was plainly indicated that the Bondified money transfer trademark was registered in the United States Patent Office by

APPENDIX.

Text Of Pertinent Provisions Of Statute Here Involved.

Illinois Revised Statutes, 1953, Chap. 161 1/2.

COMMUNITY CURRENCY EXCHANGES

AN ACT in relation to the definition, licensing and regulation of community currency exchanges . . . approved June 30, 1943, L. 1943, vol. 1, p. 233; as amended by Act approved June 27, 1951, L. 1951, p. 562.

Sec. 1 (Rev. Stat. Sec. 31) *Definitions—Businesses to which Act applicable.*

§ 1. For the purposes of this Act: .

“Community currency exchange” means any person, firm, association, partnership or corporation, except banks incorporated under the laws of this State and National Banks organized pursuant to the laws of the United States, engaged at a fixed and permanent place of business, in the business or service of, and providing facilities for, cashing checks, drafts, money orders or any other evidences of money acceptable to such community currency exchange, for a fee or service charge or other consideration, or engaged in the business of selling or issuing money orders under his or their or its name, or any other money orders (other than United States Post Office money orders, American Express Company money orders, Postal Telegraph Company money orders, or Western Union Telegraph Company money orders), or engaged in both such businesses, or engaged in performing any one or more of the foregoing services. . . .

Sec. 2 (Revised Stat. Sec. 32) *License to operate community currency exchange—Penalty for operation without license—Injunction.* § 2. No person, firm, association, partnership or corporation shall engage in the business of a community currency exchange or in the business of an ambulatory currency exchange without first securing a license to do so from the Auditor.

Any person, firm, association, partnership or corporation that violates this section shall be fined not less than \$500.00 nor more than \$1000.00 or imprisoned in the county jail for not more than one year, or both, and the Attorney General or the State's Attorney of the county in which the violation occurs shall file a complaint in the Circuit Court of the county to restrain the violation. As amended by act approved June 27, 1951. L. 1951, p. 562.

Sec. 4 (Revised Stat. Sec. 34) *Application for license—Contents—Fees.*

§ 4. Application for such license shall be in writing under oath and in the form prescribed and furnished by the Auditor. * * * Such application shall be accompanied by a fee of \$25.00 which fee shall be for the cost of investigating the applicant. When the application for a community currency exchange license has been approved by the Auditor and the applicant so advised, an additional sum of \$50.00 as an annual license fee for a period terminating on the last day of the current calendar year shall be paid to the Auditor by the applicant * * *

Sec. 5 (Rev. Stat. Sec. 35) *Bond—Conditions—Amount.* § 5. Before any license shall be issued to a community currency exchange the applicant shall file annually with and have approved by the Auditor a surety bond

Sec. 6 (Rev. Stat. Sec. 36) *Insurance against burglary, etc.—Amount.* § 6. Every applicant for a license hereafter shall, after his application for a license has been approved, file with and have approved by the Auditor a policy or policies of insurance * * *

Sec. 8 (Rev. Stat. Sec. 38) *Exchange to be conducted as separate unit.* § 8. A community or ambulatory currency exchange shall not be conducted as a department of another business. It must be an entity financed and conducted as a separate business unit. * * * No community currency exchange hereafter licensed for the first time shall share any room with any other business, trade or profession nor shall it occupy any room from which there is direct access to a room occupied by any other business, trade or profession.

Sec. 14 (Rev. Stat. Sec. 44) *Annual license fee.* § 14. * * * The annual license fee for each community currency exchange shall be \$50.00.

Sec. 16 (Rev. Stat. Sec. 46) *Annual report—Investigations—Costs.* § 16. Each licensee shall annually * * * file a report with the Auditor * * *. The Auditor may at any time and shall at least once a year, investigate the currency exchange business of any licensee and of every person, partnership, association or corporation who or which shall be engaged in the business of operating a currency exchange

* * * There shall be paid to the Auditor for each such examination a fee of \$20.00 for each day or part thereof for each qualified representative designated and required to conduct the examination * * *

Sec. 24 (Rev. Stat. 54) *Penalties.*] § 24. Any person, firm, association, partnership or corporation who or which shall violate any provision of this Act for which no other penalty is herein prescribed shall, upon conviction, be fined not less than fifty dollars (\$50.00) nor more than five hundred dollars (\$500.00) and each violation shall constitute a separate offense.

Sec. 30 (Rev. Stat. 56.3) *Partial invalidity.*] § 30. If any part or provision of this Act shall be declared unconstitutional, the unconstitutionality of such part or provision shall not invalidate the constitutional provisions of this Act.

9. Few public interests have a higher claim upon the discretion of a Federal chancellor than the avoidance of needless friction with State policies	10
10. A state-wide doom by a Federal court of a State's legislative policy without first permitting the State Supreme Court to pass upon it, would hardly comport with that restraint which this Court has frequently exhorted the lower Federal Courts to exercise in cases of this kind	11
Conclusion	11

TABLE OF CASES CITED.

Achtien v. Dowd, 117 F. (2) 989	10
Alabama Com. v. Southern Ry. Co., 341 U. S. 341	11
Bevins v. Prindable, 39 F. Supp. 708, aff'd, 314 U. S. 573	7, 10
Burford v. Sun Oil Co., 319 U. S. 315	7, 12
Chicago v. Fieldcrest Dairies, 316 U. S. 168	11
C.I.O. v. McAdory, 325 U. S. 450	8
Currency Services, Inc. v. Matthew, 90 F. Supp. 40	9, 10
Dorchy v. Kansas, 264 F. S. 286	9
Douglas v. Jennette, 319 U. S. 157	7
Federation of Labor v. McAdory, 325 U. S. 450	8
Ford v. Caspers, 128 F. (2) 884	9
Gadlin v. Auditor of Public Accounts, 414 Ill. 89	4
Great Lakes Dredge & Dock Co. v. Huffman, 319 U. S. 293	11
Laggett v. Lee, 288 U. S. 517	9
McDougall v. Lueder, 389 Ill. 141	3
Phillips v. U. S., 312 U. S. 246	12
Public Service Com. v. Wycoff Co., 344 U. S. 237	8
Railroad Com. v. Pullman Co., 312 U. S. 496	11
Spector Motor Co. v. McLaughlin, 325 U. S. 161	8
Stainback v. Mottock, 336 U. S. 368	9
Touney v. N. Y. Life Ins. Co., 314 U. S. 118	11